Court of Appeals, State of Michigan

ORDER

Sylvia Wynns v Fountain Court Consumer Housing Cooperative

Docket No. 252713

LC No. 02-243749-NO

Peter D. O'Connell
Presiding Judge

Bill Schuette

Stephen L. Borrello
Judges

The Court's opinion in this case, which was released on July 5, 2005, erroneously held that we did not have jurisdiction to review appellants' challenge to the dismissal of the breach of contract claim because appellants failed to specifically challenge the June 25, 2003 order of summary disposition in their claim of appeal from the November 25, 2005 final order. That reasoning is erroneous because a final order subsumes a prior order that was not appealable by right and, therefore, the appellant is free to raise issues related to the earlier order. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 272; 487 NW2d 807 (1992); *Dean v Tucker*, 182 Mich App 27, 31; 451 NW2d 571 (1990). Despite the error, we nevertheless affirm the trial court's grant of summary disposition on the ground that appellants failed to establish a genuine issue of material fact that defendant Fountain Court breached a contractual duty to allow Brascia Cannon to reside at the cooperative. The Occupant Agreement clearly shows that only Wynns signed it and that Cannon's name does not appear anywhere on the document. Although the trial court granted summary disposition on this claim under MCR 2.116(C)(8), we hold that summary disposition was instead proper under MCR 2.116(C)(10). See *Energy Reserves, Inc v Consumers Power Co,* 221 Mich App 210, 216; 561 NW2d 854 (1997) (holding that an order granting summary disposition under the wrong subrule may be reviewed by this Court under the correct subrule). This Court will not reverse where the trial court reaches the right result, albeit for the wrong reason. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989); *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

COURT OF APPEALS OF THE STATE OF MICHIGAN
E PLURIBUS UNUM
TUEBOR
CIRCUMSPICE
1965

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUL 14 2005
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

SYLVIA WYNNS and BRASCIA CANNON,

Plaintiff-Appellants,

v

FOUNTAIN COURT CONSUMER HOUSING COOPERATIVE and MARTINA HALE,

Defendant-Appellees.

UNPUBLISHED
July 5, 2005

No. 252713
Wayne Circuit Court
LC No. 02-243749-NO

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff Brascia Cannon appeals as of right from a November 25, 2003 order granting defendants' motion for summary disposition as to his claims for defamation and intentional infliction of emotional distress. Plaintiff Sylvia Wynns appeals the trial court's June 25, 2003 order granting defendants' motion for summary disposition as to her breach of contract claim and dismissing her from the litigation. We affirm.

Wynns is a member and resident of the Fountain Court Consumer Housing Cooperative (Fountain Court). Cannon, Wynns son, resided there with her and worked for Fountain Court as a maintenance employee. In the evening of April 17, 2002, Cannon and several others were celebrating in a garage at the cooperative. During this celebration, Martina Hale, also a Fountain Court employee, accused Cannon of pulling a telephone off a wall, smashing a window, and spreading gasoline about the garage and threatening to set it on fire. Hale further asserted that she and another person, Gary Sanderfer, had to restrain Cannon to prevent him from lighting a fire. Because of Hale's allegations, police arrested Cannon and charged him with attempted arson. Eventually, he pleaded guilty to the lesser charge of malicious destruction of personal property worth more than $200 but less than $1,000 in violation of MCL 750.377a(1)(c). Because of these events, Fountain Court refused to allow Cannon to continue residing at the cooperative.

We first consider Wynns' claim that Fountain Court breached her occupancy agreement by evicting Cannon. The June 25 order granting summary disposition of this claim dismissed only Wynns. Pursuant to MCR 2.604(A), orders "adjudicating fewer than all the claims, or the

rights and liabilities of fewer than all the parties," are not appealable as of right "before entry of final judgment."[1] Once a trial court enters a final order dispensing with all claims and adjudicating the rights of all parties, the losing party has 21 days to file an appeal as of right. MCR 7.202(6)(a); MCR 7.204(A)(1)(a). The time limit for appeals as of right is jurisdictional and this Court may not hear appeals not filed in a timely manner. *Baitinger v Brisson*, 230 Mich App 112, 116; 583 NW2d 481 (1998); MCR 1.203(A).

In the instant case, plaintiffs could have filed an appeal as of right regarding the June 25 order after entry of the November 25 order adjudicating all of the claims raised in their complaint. But plaintiffs only claimed an appeal from the November 25 order. Although under MCR 2.604(A), plaintiffs could have appealed the June 25 order as of right within 21 days of the entry of the final order on November 25, they failed to do so. Consequently, plaintiffs did not file a timely appeal of the June 25 order and this Court does not have jurisdiction to review the trial court's decision.

We next examine Cannon's claim that the trial court erred in granting defendants' motion for summary disposition regarding his defamation claim. A trial court's decision to grant or deny summary disposition presents a question of law that we review de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002).

Summary disposition is appropriate under MCR 2.116(C)(10) when there is "no genuine issue as to any material fact." A question of material fact exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In deciding a motion under this rule, the trial court must consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

"A communication is defamatory if, under all the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or deters others from associating or dealing with the individual." *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000). To establish a prima facie case of defamation, a plaintiff must generally show:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). [*Id.*]

[1] A party does have the right to file an application for leave to appeal from such an order within 21 days of its entry. MCR 2.604(A); MCR 7.203(B)(1), MRC 7.204 (A)(1)(a). Plaintiffs in the instant case did not file an application for leave.

In the instant case, defendants concede that Hale made the statements as alleged by Cannon. Further, defendants correctly note that truth is an absolute defense to a defamation claim. *Porter v Royal Oak*, 214 Mich App 478, 486; 542 NW2d 905 (1995). Plaintiff has failed to demonstrate that a question of fact exists because in a plea agreement he pled guilty to one of the crimes for which he was accused by Hale of committing. Consequently, we affirm the decision of the trial court on the issue of defamation.[2]

Finally, we consider Cannon's claim that the trial court erred in granting summary disposition as to his claim for intentional infliction of emotional distress. To state such a claim, a plaintiff must prove "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004). The defendant's conduct "must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* Generally, the trial court must "determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Id*. But where reasonable minds might disagree as to whether the conduct is of a level permitting recovery, it becomes a question of fact for the jury. *Id.*

In the instant case, Hale accused Cannon of destroying property belonging to Fountain Court and threatening to set fire to one of its buildings. Based on Cannon's guilty plea to the charge of malicious destruction of property, it is evident that he was engaged in some sort of criminal activity on the evening in question. Under the circumstances, Hale's statements regarding Cannon's threats, even if untrue, did not constitute the sort of extreme and outrageous behavior that would permit recovery for intentional infliction of emotional distress. Consequently, we affirm the trial court's grant of summary disposition as to this claim.

Affirmed.

/s/ Peter D. O'Connell
/s/ Bill Schuette
/s/ Stephen L. Borrello

[2] The "gist" of Hale's statement was that Cannon had committed a crime. As a result of Hale reporting a crime, Cannon pled guilty to one of the reported crimes and, therefore, plaintiff's defamation claim is meritless.